

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Case No. 23-11289-pb  
. Chapter 11  
560 SEVENTH AVENUE OWNER .  
PRIMARY LLC and 560 SEVENTH .  
AVENUE OWNER SECONDARY LLC, . One Bowling Green  
. New York, NY 10004  
. .  
Debtors. . Friday, December 8, 2023  
. 2:00 p.m.  
. . . . .

TRANSCRIPT OF EMERGENCY MOTION FOR ENTRY OF AN ORDER  
(I) CONFIRMING CHANGE OF CONTROL OF DEBTOR 560 SEVENTH AVENUE  
OWNER PRIMARY LLC; (II) TERMINATING PRIOR MANAGEMENT;  
AND (III) GRANTING RELATED RELIEF [81]  
BEFORE THE HONORABLE PHILIP BENTLEY  
UNITED STATES BANKRUPTCY COURT JUDGE

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Also Present:	STEVEN SCHROEDER  GREG DENTON  BRANDON FLURY



1 (Proceedings commence)

2 THE COURTROOM DEPUTY: Good afternoon, this is Greg  
3 White, the courtroom deputy. We're here today on Case Number  
4 23-11289, 560 Seventh Avenue Owner Primary LLC and 560 Seventh  
5 Avenue Owner Secondary LLC on the emergency motion for entry of  
6 an order confirming change of control of debtor, terminating  
7 prior management, and granting related relief.

8 At this time, for those who wish to speak, please go  
9 ahead and state your name and who you represent for the record.

10 MR. NASH: Good afternoon. Kevin Nash for the  
11 debtors.

12 MR. STRICKON: Good afternoon. Harvey Strickon for  
13 the AREPIII MVTs, LLC, and CREP Times Square Hotel LLC.

14 MR. SCHMIDT: Good afternoon. Frederick Schmidt of  
15 Cozen O'Connor, proposed counsel for 560 Seventh Avenue Owner  
16 Primary LLC.

17 MR. GREENE: Good afternoon. Anthony Greene,  
18 Cadwalader, Wickersham and Taff on behalf of OWS CRE Funding I,  
19 LLC.

20 MR. RINGEL: Good afternoon. Fred Ringel from Leech  
21 Tishman Robinson Brog on behalf of DHG TSQ LLC, the hotel  
22 manager.

23 MR. MARKOWITZ: Good afternoon. Scott Markowitz,  
24 Tarter Krinsky and Drogan for Garment Center Congregation. I'm  
25 not sure I'll say anything, but I'm appearing.



1 And Harvey, your voice thing is still off again from  
2 last time. You should check it. It's not clear.

3 MR. REICH: Good afternoon. Jeffrey Reich from the  
4 Law Firm of Reich, Reich, Reich, PC. We represent IMCMV Times  
5 Square LLC, tenant.

6 MR. MASUMOTO: Good afternoon, Your Honor. Brian  
7 Masumoto for the Office of the United States Trustee.

8 MR. GAGION: Good afternoon, Your Honor. Leo Gagon  
9 from the Office of the United States Attorney General for the  
10 Department of Taxation and Finance.

11 THE COURTROOM DEPUTY: Okay, thank you, everyone.  
12 And the judge will be out in just a moment.

13 (Pause)

14 THE COURT: Good afternoon. We're here on the  
15 emergency motion of the purported representatives of the  
16 debtor. I may refer to that party as the lenders, because  
17 unless and until I find that they're in fact acting for the  
18 debtor, they're really just representatives of the lenders.  
19 And when I say lenders, I mean, at this point, Mr. Strickon's  
20 clients, who I guess, Mr. Strickon, would it be accurate as  
21 shorthand to say your clients are the senior mezzanine lenders?

22 MR. STRICKON: Yeah, they're the secondary debtor.

23 THE COURT: Correct. So let's try it again. What's  
24 the best shorthand for your clients?

25 MR. STRICKON: I think just refer to them as the



1 lenders.

2 THE COURT: Okay. Although, I don't want to get them  
3 confused with Cadwalader's --

4 MR. STICKON: No, Cadwalader will refer to their  
5 clients as OWS, One William Street.

6 THE COURT: Okay, I got to tell you, all these  
7 acronyms make my head spin. So I think of your clients as, how  
8 about this, the second -- the lenders at secondary, and  
9 Cadwalader's clients are the lenders at primary.

10 MR. STRICKON: That's fine. That's simple enough.

11 THE COURT: Okay. And I guess just to be clear, the  
12 senior lenders at each of those two debtors.

13 MR. STRICKON: Correct.

14 THE COURT: Okay. All right. With that preamble,  
15 before we get to argument, let me first ask whether anybody --  
16 you know, I'm a litigator by background, and so I like to do  
17 things and follow the proper procedures and deal with the  
18 evidence before getting to argument. And so that we have the  
19 record closed before we get to argument.

20 So let me ask if any of the parties have evidence  
21 they want to offer. And I'll start with Mr. Schmidt as the  
22 movants counsel.

23 MR. SCHMIDT: Thank you, Your Honor. Good afternoon.  
24 Thank you very much for being able to accommodate us today on  
25 shortened notice. It's very important for the debtor, very



1 important for this case. That said, we do not have any  
2 evidence to offer into the record. And Mr. Strickon is really  
3 going to be taking the laboring or at argument for our side of  
4 the ledger.

5 THE COURT: Okay. I guess let me turn next to  
6 Mr. Nash. Well, sorry, just to be clear, since you mentioned  
7 Mr. Strickon, Mr. Strickon, I gather you don't have evidence  
8 you want to offer either, do you?

9 MR. STRICKON: That's correct, Your Honor. We did  
10 quote in our papers certain provisions of the pledge and  
11 security agreement. But there is no dispute that those in fact  
12 are provisions and that they are accurate quotations.

13 THE COURT: Yes, I -- yes, I have several of the  
14 governing documents in front of me that we'll be talking about  
15 in the course of argument. So I'm comfortable that those are  
16 in the record. But you have nothing other than the governing  
17 documents?

18 MR. STRICKON: No, Your Honor.

19 THE COURT: Okay.

20 Mr. Nash.

21 MR. NASH: No, Your Honor. I'm not putting anything  
22 other than the exhibits that I put in that were attached to the  
23 letters and so forth. I do agree that the three operative  
24 documents, the two operating agreements in the pledge, I think  
25 are in the record. I hope we sent in the hotel operating



1 agreement, which is primary, and I hope Your Honor's chamber's  
2 got that. So --

3 THE COURT: We did.

4 MR. NASH: -- I think that there's two operating  
5 agreements in the pledge. And the notice of disposition of  
6 collateral and the other stuff that's online on the ECF, you  
7 know, the notices that were sent and so forth.

8 THE COURT: So I'm sorry, I just want to be clear,  
9 because I don't remember exactly what was the next to your  
10 papers. I'm going to treat the two operating agreements, that  
11 is the operating agreements for the two debtors and the pledge  
12 agreement as being in the record and also the notice of  
13 disposition of collateral. Remind me what else you next to  
14 your papers.

15 MR. NASH: I think you just mentioned it, that  
16 September 6th amended and restated notice -- notification of  
17 disposition of collateral, which also had the -- as exhibits,  
18 the bidding procedures, or the terms of sale for the public  
19 auction and the memorandum of sale documents and the exhibits  
20 that went along with that. That was part of my original  
21 letter, which I incorporated, and that was issued by the  
22 mezzanine lender. I did put in yesterday, I think, an exhibit,  
23 which, if I'm not mistaken, was the operating agreement at the  
24 mezzanine level. And we forwarded to chambers the operating  
25 agreement at the hotel level, and it was referenced to the





1 pledge agreement by Mr. Strickon. And that's an agreement I  
2 think is in the record at some place dated September 13th,  
3 2021. But the quotations from it are not disputed. We're all,  
4 I think, operating under the same set of agreements.

5 THE COURT: Okay. And let me just invite anyone else  
6 to chime in if -- either if they have any issues with my  
7 considering the documents Mr. Nash mentioned, or if there's any  
8 other documents that they think I should be considering in  
9 connection with this motion.

10 Okay, so I just wanted to make sure we're clear on  
11 what I'm looking at before we proceed. All right, so let's  
12 move into argument. Mr. Schmidt, it's your motion.

13 MR. SCHMIDT: Yes, Your Honor. On behalf of sort of  
14 the, I guess we call it the mezz lender side of the equation,  
15 Mr. Strickon will be taking the laboring war for arguments.  
16 So, unless Your Honor has any specific questions for me, I'll  
17 hand it over to Mr. Strickon.

18 THE COURT: That's fine.

19 Mr. Strickon, please proceed.

20 MR. STRICKON: Yes, Your Honor. As the first  
21 observation, the objections that have been filed by the debtor  
22 to the relief that's being sought, in our view, is nothing more  
23 than stalling and vindictiveness and apparent retribution by a  
24 principal of the debtor, because the debtor's principal is  
25 being the subject of a litigation on his personal guarantee.



1 The truth of the matter -- yeah, the truth of the matter, you  
2 know, it -- yeah?

3 THE COURT: Mr. Strickon, I'm going to cut you off  
4 for a second. I'm under a somewhat tight schedule here.

5 MR. STRICKON: I'll go to the next point, Your Honor.

6 THE COURT: Yeah, but just let me make it clear so  
7 that the parties have a common understanding. I have another  
8 hearing at 4. I need to spend half an hour preparing for that.  
9 So we need to be done --

10 MR. STRICKON: Good.

11 THE COURT: -- ideally in an hour. And so I'd ask  
12 you to -- I don't want to hear about -- well, here's what I  
13 want to hear about. I want to hear about what you believe your  
14 client's rights are under the governing documents. And also,  
15 your position on whether this is really an emergency, because  
16 frankly, I'm not seeing an emergency. But those are the two  
17 things I'd like to hear you on.

18 If there's other things you think I have to hear  
19 about, you can let me know. But I really don't want to hear  
20 about any sort of back and forth about equities that are  
21 independent of the two things.

22 MR. STRICKON: That's fine. I'll just hit the legal  
23 points. At the last conference, Your Honor, the debtor made a  
24 point of accusing the lenders of trying to avoid the payment of  
25 transfer taxes. What I just want to say briefly on this, that



1 there's no evil intent here. The debtor -- the secured lenders  
2 are looking to utilize an express tax exemption under the  
3 bankruptcy code that has been used for decades. And in fact,  
4 in the old days, they even used this exemption in connection  
5 with 363 sales until the Supreme Court says you can't do that.

6 Those are issues that will be addressed at the time  
7 of confirmation of any plan of reorganization. So it's  
8 premature to make any observations about that. Mr. Nash has  
9 not really presented any controlling legal authority as to why  
10 the provisions and the change in control are not fully  
11 enforceable. In fact, the lenders were provided as the -- yes,  
12 sir?

13 THE COURT: Mr. Strickon, I'm sorry to interrupt  
14 again, but before we get to that, and I absolutely want to hear  
15 you --

16 MR. STRICKON: Sure.

17 THE COURT: -- on (indiscernible), but can we start,  
18 please, with whether this really is an emergency?

19 MR. STRICKON: Yes, it is an emergency, Your Honor.  
20 Because of the cloud that has been created on who's in charge  
21 here, vendors are unwilling to deal, quite frankly, with either  
22 party until they have some knowledge or understanding as to  
23 who's really in charge. And that's --

24 THE COURT: Here's the problem I have with that. You  
25 are -- you and your co-counsel are both capable lawyers. I



1 assume you know how to make a record. You have apparently  
2 chosen not to make any factual record whatsoever on the need  
3 for expeditious relief. All I have is a single, very short  
4 paragraph in a lawyer's affidavit. That is not evidence.

5 So I just want to make clear, I want to hear what you  
6 have to say, but my starting point is you and your co-counsel  
7 have chosen not to make a record of any need for expeditious  
8 relief.

9 MR. STRICKON: Well, I think the need for expeditious  
10 relief was created by Mr. Nash on behalf of --

11 THE COURT: You're (indiscernible).

12 MR. STRICKON: That's where it all started, Your  
13 Honor.

14 THE COURT: Mr. Strickon, you are asking me to  
15 shorten time.

16 MR. STRICKON: Yeah.

17 THE COURT: I am hearing you on less than 48 hours'  
18 notice. My clerks got up at 6 a.m. this morning to read the  
19 reply brief. So I want to hear why you're telling me I've got  
20 to decide today.

21 MR. STRICKON: Well, one issue, for example, is that  
22 NEC, which install the telephone and security systems in the  
23 hotel, is threatening to yank them out because they haven't  
24 been paid. And you --

25 THE COURT: They have --



1 THE STRICKON: Yeah?

2 THE COURT: You have to make a record of that.

3 MR. STRICKON: I'm sorry?

4 THE COURT: You have chosen not to make a proper  
5 evidentiary record --

6 MR. STRICKON: Yeah. We put it in our argument,  
7 okay? And with a --

8 THE COURT: Exactly (indiscernible) --

9 MR. STRICKON: -- shortened period of time, I can't  
10 get an affidavit from NEC, although I'm not sure if their  
11 counsel may be here, and their counsel could make a statement  
12 to that effect also. I understand the shortness in the time,  
13 but, you know, I'm trying to get the point across that there  
14 are operational issues. And I think Mr. Nash will even confirm  
15 that there are operational issues because of uncertainty as to  
16 who's in charge here.

17 THE COURT: So give me your full litany in as much  
18 detail as you have available of what the urgent -- what the  
19 urgency comes -- what the facts are that demonstrate the need  
20 for immediate action.

21 MR. STRICKON: Well, I mentioned the fact that the  
22 NEC has contacted us and is threatening to shut down the  
23 telephone and security systems since they haven't been paid.  
24 We understand, we've done a preliminary investigation, that the  
25 debtor has run up a million dollars in unpaid sales tax and



1 occupancy taxes and some \$100,000 in penalties for non-payment.  
2 It's -- the urgency is that the operation of the hotel at this  
3 point is getting, you know, worse and worse as the days go by  
4 because nobody has taken a firm control over getting these  
5 creditors satisfied so that the hotel can operate flawlessly.  
6 And the debtor has done nothing in these cases in five months.  
7 There's been nothing to address any of the claims. There's  
8 nothing that's ever been presented to the Court as to what the  
9 debtor intends to do if it gets more time. Indeed, the debtor  
10 has gotten additional time when they could refinance and pay  
11 off the mezzanine debt and redeem the property, but they  
12 haven't done anything there either.

13           Whereas our clients have actually entered into an  
14 agreement with One William Street. It's been executed to  
15 restructure the senior debt to get this case moving.

16           THE COURT: Okay. Mr. Strickon --

17           MR. STRICKON: Yeah?

18           THE COURT: -- let me sharpen the question a little  
19 bit. If I were to say I'm not satisfied, and I want to get  
20 into the merits in a moment, but assume for a moment that my  
21 ruling today maybe I am not persuaded that you have shown an  
22 entitlement to the relief that's requested. However, I am --  
23 that -- I might make that ruling without prejudice to your  
24 ability to come back on regular notice and have a hearing, you  
25 know, say, two or three weeks from now. What I want to hear



1 is, are you really telling me that there would be meaningful  
2 harm suffered because of the delay between today and let's call  
3 it three weeks from now?

4 MR. STRICKON: Yeah. I believe so, and I believe  
5 that if that was the Court's ruling, Mr. Nash would be back  
6 into court asking for relief because of the fact that his  
7 client -- I shouldn't say his client, the principals that  
8 purportedly are running the hotel have had their hands tied  
9 because of the cloud created on the control issue. We didn't  
10 come to the Court in the initial. Don't forget, we didn't  
11 start this proceeding. This was started by Mr. Nash when he  
12 wrote a letter to the Court saying there's a cloud. We needed  
13 to be removed.

14 So I'm a little bit confused as to why the burden is  
15 being put on us when we brought --

16 THE COURT: (Indiscernible).

17 MR. STRICKON: -- back this motion in the first  
18 place.

19 THE COURT: No. It's because he didn't make a  
20 motion. He --

21 MR. STRICKON: Oh, that's right. That's right.

22 THE COURT: And I was very clear at the status  
23 conference that I don't grant relief, generally speaking --

24 MR. STRICKON: Yeah.

25 THE COURT: -- at status conferences. I require a



1 proper motion. So you and your co-counsel then made an  
2 emergency motion. That's why I'm busting your chops about the  
3 lack of evidence.

4 MR. STRICKON: Well, the answer is that Mr. Nash --  
5 we had -- somebody had to make a motion to bring this on so we  
6 could have a conference with Your Honor on Friday of this week.

7 THE COURT: Okay.

8 MR. STRICKON: And so, you know, and it didn't appear  
9 that Mr. Nash was doing anything. So we were the ones that  
10 took the laboring oar.

11 THE COURT: All right, let's turn to the merits. Let  
12 me tell you what the problem I have is with your position. You  
13 have put one document before me, the pledge agreement, and  
14 reading just the pledge agreement, which by the way is all that  
15 I had before me at the status conference, it appears to support  
16 your position. What you did not put before me is the operating  
17 agreement, or maybe the title used in this case for it is the  
18 LLC agreement. You didn't put that before me and you didn't  
19 address the governing law, Delaware corporate law. And when I  
20 look at both of those, which I've now done, they're darn clear.  
21 They say your clients, as the lenders and the pledgees, have  
22 the right to take over management functions, exercise  
23 management powers upon a foreclosure, but not before. In other  
24 words, it's flat out contrary to what one of the provisions of  
25 the pledge agreement says.





1           That's what I want you to address, because frankly, I  
2 look at that and I do not see any basis to rule in your favor.

3           MR. STRICKON: Well, I, you know, (indiscernible) of  
4 time, one thing I can see in reference to Your Honor is that at  
5 the closing, our clients received an enforceability opinion.  
6 And not, you know, unusual, the enforceability opinion came  
7 from Mr. Nash's own firm that these documents were enforceable  
8 in accordance with their terms. And as we voted in our re-  
9 trial (indiscernible) during the service --

10           THE COURT: Mr. Strickon, you're having audio  
11 problems again. And I'm saying this because half of what you  
12 just said, I could not hear. It sounded like you were  
13 underwater.

14           MR. STRICKON: What I'm saying, Your Honor, is that  
15 the pledge agreement would state --

16           THE COURT: I can't hear you. Mr. Strickon, take me  
17 off the speaker and speak into your phone. It's the only way  
18 I'm going to be able to hear you.

19           MR. STRICKON: I'll dial into my phone and then I'll  
20 deal with my --

21           (Pause)

22           MR. STRICKON: Can you hear me now, Your Honor?

23           THE COURT: Yes, I hear you. Now I hear an  
24 echo. That's really weird.

25           MR. STRICKON: Let me take off the speaker. Can



1 you hear me now, Your Honor?

2 THE COURT: Yeah, there's an echo.

3 MR. STRICKON: Wait a second. How about -- not  
4 very good at going on at the same time. Let me try again  
5 without the phone.

6 THE COURT: Okay.

7 MR. STRICKON: Can you make me out now, Your  
8 Honor?

9 THE COURT: Now it's clear. Fingers crossed.

10 MR. STRICKON: Okay. Sorry about that.

11 THE COURT: Let me make a request. This is the  
12 second hearing in a row that this has happened in. Let me  
13 make -- let me strongly urge you to call your tech people and  
14 get this fixed before the next hearing, because it makes it  
15 difficult to conduct our business.

16 MR. STRICKON: Okay. What I was saying is that  
17 the pledge agreement is quite clear. Okay. And it does  
18 provide that we can exercise all rights and remedies as if we  
19 were the member of the primary. And the -- there is nothing in  
20 the -- what do you call it -- the operating agreement or  
21 Delaware law that says we cannot do that.

22 THE COURT: That's absolutely not true.  
23 Delaware law says that unless the operating agreement or the  
24 LLC agreement --

25 MR. STRICKON: Mm-hmm.



1 THE COURT: -- (indiscernible) it doesn't say a  
2 pledge agreement can give you these rights. It says unless the  
3 LLC agreement so provides, you don't get management rights  
4 until you foreclose.

5 MR. STRICKON: I'm going to have to check with  
6 our corporate people who are familiar with all these documents.  
7 I'm only a bankruptcy lawyer, but I will tell you that at the  
8 closing of the transaction, the lenders obtained an opinion  
9 letter from counsel to the borrower that these agreements are  
10 all enforceable and in accordance with their terms.

11 THE COURT: So you (indiscernible) --

12 MR. STRICKON: And that's Mr. Nash's firm, by  
13 the way.

14 THE COURT: Yeah. You know, there's two  
15 relevant provisions of the pledge agreement. You quoted both  
16 of them in your letter. You didn't -- you only mentioned one  
17 of them just now. The other one is relevant because it says  
18 that upon a default, you have management powers to the maximum  
19 extent permitted by law. So, that provision appears -- looks  
20 to me like it's a reference to the limitations contained in the  
21 LLC statute.

22 MR. STRICKON: I went through the LLC agreement  
23 very quickly, and I didn't see any limitations in the LLC  
24 agreement. Unless Mr. Nash is able to point them out.

25 THE COURT: I'm sorry. You're having audio



1 problems again.

2 MR. STRICKON: (Indiscernible) I very quickly  
3 went through the LLC agreement to try to find provisions that  
4 would bear on the exercise of theses remedies, and I was unable  
5 to find anything.

6 THE COURT: You said the LLC agreement or the  
7 LLC statute?

8 MR. STRICKON: The LLC agreement or the LLC  
9 statutes.

10 THE COURT: So look at -- okay. So the LLC  
11 statute is Delaware -- it's section 18-702(b)(3) of the  
12 Delaware LLC statute. And the operative provision of the LLC  
13 agreement is section 23(b) and(c). You know what? I'm going  
14 to -- I don't want to pause while you read those sections now.  
15 I want to ask you, is there anything else you want to include  
16 in your argument? Then I'll turn to Mr. Nash. And when he and  
17 others have had their say, I'll let you tell me what you have  
18 to say about the statute and the LLC agreement. Because by  
19 then you'll have had some time to review them. Does that  
20 seem -- does that work from your standpoint?

21 Okay. Mr. Nash, it's your turn.

22 MR. NASH: Yes, Your Honor. We did put in objections  
23 to the motion. And I'd like to just, you know, go towards the  
24 emergency to (indiscernible). I hope that's my voice. Maybe  
25 now I have a problem.



1 Can you hear me, Judge?

2 THE COURT: Yeah, that's better. It actually was not  
3 perfect a moment ago.

4 MR. NASH: I got a little nervous there. We did -- I  
5 don't think there's an emergency here, Judge. This hotel is  
6 running under the cash collateral order. We submitted an  
7 extension this week, I believe Wednesday. All the bills and  
8 the expenses at our hotel will be paid through the cash  
9 collateral order. I've been very responsive to the senior  
10 lender in addressing cash collateral concerns.

11 The issue that Mr. Strickon raised today happened to  
12 do with I gave approval to pay the money directly instead of --  
13 and we have this in a new cash collateral order, instead of  
14 switching it over to the DIP account. Expenses are paid.  
15 They're budgeted. I'm sure between now and if we have this on  
16 regular notice, Mr. Strickon and I can come up with a protocol.  
17 Everybody's in favor of making sure expenses are paid.

18 I do think they overplayed the issue of an emergency  
19 nature of this motion. As Your Honor said, there is no  
20 evidence of anything of that nature in the documents. And I do  
21 think that the emergency nature, there's no basis for that.

22 I do recognize the issue. The issue is what happens  
23 if there's an incomplete foreclosure sale, and that's what  
24 we're dealing with.

25 THE COURT: Yeah. Mr. Nash, before you turn to that,



1 let me just ask you, sticking with the emergency issue for a  
2 moment. What's your response to what Mr. Strickon said about  
3 NEC threatening to cut you off?

4 MR. NASH: There -- I got a call literally two hours  
5 or three hours before the hearing from the senior lender. They  
6 received a request for payment, and the issue there was instead  
7 of taking the money from the suspense account and putting it  
8 into the DIP account, which is -- would take a little bit of  
9 time, was it okay to pay it directly from the suspense account?  
10 I immediately said yes. I copied Mr. Strickon on that email,  
11 and I -- and the senior lender then copied Mr. Strickon.

12 So going into the hearing, Mr. Strickon was aware  
13 that that issue has been addressed. I think it's fair to say I  
14 got a phone call, and I addressed it within five minutes' time.  
15 And so the goal here is -- there's a dispute as to a legal  
16 issue. The goal here is not to do anything to harm the hotel  
17 between three sets of lawyers. And I am more than confident,  
18 because we're on our fourth or third extension of cash  
19 collateral, we do have the budgets in place, that all of these  
20 issues can be easily addressed. And I understand, if I'm not  
21 mistaken, Your Honor has the extension of cash collateral.

22 So I dealt with that issue this morning.  
23 Mr. Strickon knew I dealt with it, and I will continue to deal  
24 with all administrative issues. We have never stood in the way  
25 of paying any bill, any expense. The cash collateral order



1 does have, you know, procedures in terms of funding into one  
2 account into another, but we will never stand in the way of  
3 making sure expenses are paid.

4 THE COURT: And sorry, I have one question. I didn't  
5 follow the acronym that Mr. Strickon used. I think it was NEC?  
6 Who are they?

7 MR. NASH: I -- if I'm not mistaken, I think that's  
8 the name of the big company that does the servicing for the  
9 hotel at the phone level. Is that the NEC company, the old NEC  
10 company, Mr. Strickon?

11 MR. STRICKON: Yeah. NEC is the equipment leasing  
12 company. And the one thing that I didn't mention is that the  
13 lenders were under the assumption that the equipment had been  
14 purchased. And according to NEC, it was not purchased. It was  
15 subject to an equipment lease, and that the debtor was in  
16 arrears in making its monthly lease payments.

17 AUTOMATED VOICE SYSTEM: You're muted.

18 THE COURT: Okay, thank you for the clarification.

19 Mr. Nash, I'm not sure, did you respond to that  
20 point, the point about NEC threatening to terminate?

21 MR. NASH: I got an email that they were -- my  
22 information was they wanted to be paid, and we took care of  
23 that this morning.

24 THE COURT: Okay. Let me ask you, because to me, it  
25 seems plausible that, you know, when there's an uncertainty



1 about who controls and has the right to manage a company of any  
2 sort, including a hotel, it strikes me as quite plausible that  
3 that could cause problems, operational problems. You're  
4 telling me that so far you don't think any problems have  
5 occurred or are likely to occur anytime soon?

6 MR. NASH: Yes. You know, there isn't a hotel  
7 manager in place. What we're talking about is the senior level  
8 management of the hotel, not day-to-day operations. There's a  
9 hotel manager in place. The hotel manager actually runs the  
10 day-to-day. There's a budget in place. There is a -- we've  
11 been doing this for four or five months, and there's a protocol  
12 as to how payments are made. All the payrolls, as Your Honor  
13 may recall, you know, are a Tuesday item for the ADP services,  
14 and payroll checks go out on Fridays.

15 So on a day-to-day level, the issues that we're  
16 having here will not impact the operations of the hotel on a  
17 day-to-day basis. We're talking about senior level management  
18 and not day-to-day management.

19 THE COURT: Okay. Thank you. That's helpful.  
20 Here's what I propose. I guess, first, if Mr. Strickon has --  
21 have you had enough time to review the agreement on the  
22 statute, Mr. Strickon? Because if --

23 MR. STRICKON: I have it in front of me, by me, so  
24 I'm asking if you could redirect me to the specific provision  
25 that's given you proposed.





1 THE COURT: Are you talking about the statute or the  
2 agreement?

3 MR. STRICKON: Statute. The statute, the Delaware --

4 THE COURT: Yeah. So it's Title VI of the Delaware  
5 Code.

6 MR. STRICKON: Yeah, Section 18.

7 THE COURT: Section 18-702(b)(3).

8 MR. STRICKON: Okay.

9 THE COURT: And then did you get the section of the  
10 LLC agreement that I referred to?

11 MR. STRICKON: Yes.

12 THE COURT: Okay. All right.

13 So we're going to go back to -- so I'll give you a  
14 little more time, and I'm going to go back to -- I -- Mr. Nash,  
15 I think what probably makes sense is, let me hear if you have  
16 anything more you want to say about the emergency, the need for  
17 urgent action or the lack thereof. After that, I want to hear  
18 if anybody else wants to address that issue, including -- it  
19 would be nice if we could hear from the counsel for the  
20 manager, if they're prepared to weigh in on that. And after  
21 that, we'll go back to Mr. Strickon to respond on the merits.  
22 I think, Mr. Nash, it probably makes sense for him to make his  
23 argument before I ask you to respond to him.

24 MR. NASH: That's fine, Your Honor.

25 THE COURT: Okay. So are you done on the emergency



1 issue, or did you have more to say on that?

2 MR. NASH: No, I think I've completed that.

3 THE COURT: Okay. So, Mr. -- I believe it's

4 Mr. Ringel, representing the manager?

5 MR. RINGEL: Yes, Your Honor. What I have heard from  
6 my client is that the operations are continuing in accordance  
7 with the cash collateral order, as one would expect. And  
8 beyond that, we really don't want to get into the middle or  
9 we're really agnostic as to the change of ownership issue.  
10 It's a legal issue for the Court to decide. But operationally,  
11 from a day-to-day point of view, it's my understanding that  
12 it's operating in accordance with the budget and so on.

13 THE COURT: Okay. All right. Thank you. And to be  
14 clear, I did not mean to ask you to weigh in on the merits  
15 issue.

16 MR. RINGEL: Understood, Your Honor. Thank you.

17 THE COURT: Okay.

18 Does anybody else, before I turn back to Mr. Strickon  
19 and turn to the merits, does anybody else want to be heard on  
20 the emergency issue?

21 MR. REICH: Judge, if I may just be heard on second  
22 overall, because we are affected by all this. I represent --  
23 by the way, I'm Jeffrey Reich from the Reich Law Firm, and I --  
24 we represent IMCMV Times Square LLC. My client is a -- I think  
25 the largest tenant other than the hotel, in that they run the



1 Margaritaville Restaurant and Entertainment Facility in Times  
2 Square, which is the bottom floor, and also have a contract  
3 with the hotel where they provide services to the hotel for  
4 what I understand to be all their culinary needs, so to speak.

5 And I can't really comment on the emergency issue,  
6 but I will comment to this level that this needs to be dealt  
7 with because it is causing uncertainty for my client. It's  
8 causing uncertainty for everybody. I can't say, and I will not  
9 say that it has to be dealt with today, but it does need to be  
10 dealt with. And it's really not for the Court. This is not  
11 for the Court. It's really for the parties that this needs to  
12 end on one way or the other because it's going to interfere  
13 with hurting those that are within the building and trying to  
14 provide services for the hotel.

15 There was one instance where I believe recently there  
16 was a late payment to my client. I believe that's been cured.  
17 I'm not here to make a factual record. I'm simply making a  
18 point that this does need to be dealt with, whether it's today,  
19 three weeks from now, or four weeks from now, and I urge the  
20 parties to deal with it because it is going to hurt not only  
21 the lenders, but those in the building.

22 THE COURT: So I appreciate your point. It sounds  
23 highly plausible to me. But just to put a fine point on the  
24 emergency issue, I gather you are not saying to me that if I  
25 decided it's three weeks from now, that would be too late.



1 MR. REICH: That's correct, Your Honor. I just made  
2 my point to tell the Court, I guess, from the street's  
3 perspective, in a very real sense, that this issue hanging over  
4 not only my client, but the hotel, the restaurant, the  
5 entertainment facility, it interferes, right? Because people  
6 need to know with certainty whether they have jobs, certainly  
7 in the management company Ed Allen, who we're dealing with.  
8 And I don't think I need to say anything further, Judge. I  
9 know you're time-pressed, but it's something that needs to be  
10 dealt [sic] with, but certainly not today.

11 THE COURT: Okay. All right. Thank you. Thank you  
12 for that.

13 Would -- does anybody else want to be heard on the  
14 emergency issue?

15 MR. GREENE: Good afternoon, Your Honor. Anthony  
16 Greene from Cadwalader Wickersham Taft, on behalf of OWS CRE  
17 Funding I, senior lender of the primary Debtor. We share the  
18 view that these cases need an expeditious resolution and  
19 therefore this issue as well. Clarity over who has title and  
20 control over the debtor will assist with operations. We've  
21 been working with the debtor. We have a proposed interim cash  
22 cloud order we submitted jointly this week.

23 However, there have been some difficulties in getting  
24 bills paid. There have been bills that have been submitted to  
25 OWS for funding. We've funded the DIP account and they still



1 have not been paid. I understand these issues are ongoing and  
2 we believe a resolution of this issue will aid in the operation  
3 of the hotel.

4 THE COURT: Well, and I'm going to ask you the same  
5 question I just asked Mr. Ringel. If I decide this issue three  
6 or four weeks from now rather than today, does that cause --  
7 does that delay cause problems?

8 MR. GREENE: Well, in our view, the sooner this is  
9 resolved, I think, the better. So if there is additional  
10 briefing required, we would ask that it be on some sort of  
11 truncated schedule so that we can have a resolution as  
12 expeditiously as possible.

13 THE COURT: Okay. But nobody's falling off a cliff  
14 two weeks from now or any - you don't want to point me to any  
15 specific harm that's about to occur at some definite date.

16 MR. GREENE: Well, Your Honor, in the revised fifth  
17 interim cash cloud order we submitted, there are some minor  
18 nits that we think would prevent harm in the event that  
19 there -- additional time is required, including as to the  
20 manner in which we receive invoices and the manner in which  
21 certain expenses are funded or paid.

22 For example, in the event, you know, there's an issue  
23 with payroll and OWS needs to fund it directly from one of  
24 these existing accounts, the new order provides the flexibility  
25 to do that. So in the event that the clarity issue is not



1 resolved immediately, we believe that the new order will allow  
2 us the flexibility to operate during that interim period.

3 THE COURT: Okay. And just remind me, if you would,  
4 that I guess the interim order, I believe, is currently before  
5 me. That is, I think it was filed. I think it's been signed  
6 by both sides and it has been sent to chambers.

7 MR. GREENE: Yes. Both the -- Harvey's --  
8 Mr. Strickon's group and Mr. Nash's group have reviewed and  
9 signed off on the order.

10 THE COURT: Okay. And when does the authorization to  
11 use cash collateral in that order expire?

12 MR. GREENE: I believe it is on or around January  
13 11th. It's just a one-month extension.

14 THE COURT: Okay. Okay. Okay. Thank you.

15 Does anybody else wish to be heard on the emergency  
16 issue?

17 MR. GAGION: Your Honor, Leo Gagon for the New York  
18 State Department of Taxation and Finance. Just peripheral  
19 because we just want to put on the record, whenever your Honor  
20 decides this, whether it's three weeks from now or today, the  
21 state reserves all of its rights regarding the issue of the  
22 application of Section 1146 to this transaction. And I've been  
23 in -- while I don't represent the city, I have been informed by  
24 counsel to the city that the New York City reserves those  
25 rights as well. Thank you.



1 THE COURT: Okay. Understood.

2 Anybody else? Again, just on the emergency issue.

3 Okay.

4 Mr. Strickon, have you had enough time to review --

5 MR. STRICKON: Your Honor, I would like to point out,  
6 number one, that Section 23(b) of the LLC agreement has an  
7 acknowledgement by the company that the pledge of the limited  
8 liability company interest in the company made by a member in  
9 connection with the senior mezzanine pledge agreement shall be  
10 a pledge not only of its rights with respect to profits and  
11 losses, but also a pledge of all rights, powers, and  
12 obligations of the members. So the LLC agreement --

13 THE COURT: You lost me. What provision are you  
14 reading from?

15 MR. STRICKON: Section 23(b) of the LLC agreements is  
16 an acknowledgement by the LLC that the pledge of the membership  
17 interest includes all rights, powers, and obligations of the  
18 member.

19 THE COURT: Okay. It then goes on to say some other  
20 things that are quite relevant.

21 MR. STRICKON: Yeah. It does say, though, upon a  
22 foreclosure, sale, or transfer, the successor member may  
23 exercise rights and powers of the member, except to the extent  
24 not so registered, cause the company to register to transfer.  
25 It does go on to say other things, but the acknowledgement by



1 the company is exactly what's contemplated by the Delaware  
2 statute. It says, unless the LLC agreement provides otherwise.

3 And in this case, the LLC agreement expressly  
4 provides that the member may pledge its membership interest, as  
5 well as pledging its right to exercise any powers that the  
6 member has under the LLC agreements.

7 THE COURT: The statute says that unless the LLC  
8 agreement provides otherwise, the pledge of an interest --

9 MR. STRICKON: Yeah, it says, unless the LLC  
10 agreement provides otherwise.

11 THE COURT: But hang on. It says, unless the LLC  
12 agreement provides otherwise, the pledge, quote, "shall not  
13 cause the member to have the power to exercise any rights or  
14 powers of a member."

15 MR. STRICKON: Right.

16 THE COURT: Do you have any response to that,  
17 because --

18 MR. STRICKON: Yeah, my response is that the Delaware  
19 statute says, unless provided otherwise by the LLC agreement.  
20 And this LLC agreement expressly authorizes a member to pledge  
21 its membership interests and to grant, as part of that  
22 membership interest, the right to exercise all powers otherwise  
23 held by the member.

24 THE COURT: Okay. Do you have anything else?

25 MR. STRICKON: No, I think those provisions are quite





1 specific.

2 THE COURT: Okay.

3 Mr. Nash, do you want to respond? I'm not sure you  
4 really need to say much in response, but you're welcome to.

5 MR. NASH: Judge, just briefly, I did lay out all  
6 these statutes in my objection. Mr. Strickon has under his  
7 pledge both economic and management rights. But, and this is  
8 the big but, for those to go into effect, he needs to complete  
9 the foreclosure. When he doesn't complete the foreclosure, he  
10 doesn't have automatic management rights. Everything is  
11 predicated upon completing the foreclosure. The statute that  
12 Mr. Strickon referred to is -- and it's fairly well recognized  
13 at this point, the old rule was, if you pledged a membership  
14 interest, you pledged economic entitlements, you can pledge  
15 management entitlements as well. And had he foreclosed on and  
16 completed the sale, he would have had both economic and  
17 management rights.

18 The problem here is he did not complete the  
19 foreclosure. So, I do think he cannot exercise the management  
20 rights outside of that. I did cite the statutes. I cited a  
21 case in California with comparable type of language. And it's  
22 not that he doesn't have the rights. He just didn't complete  
23 the foreclosure. And Your Honor to hit on the language to the  
24 extent permitted by Delaware law. I think Delaware law would  
25 require a completion of foreclosure. And that's our position.



1 THE COURT: Okay.

2 Would anybody else like to be heard on the merits  
3 issue? Okay. I'm not hearing any response.

4 All right. I -- here's what I'm going to do. It's  
5 now 3:04. Let's take a break for 10 minutes. And, well, let's  
6 say at 3:20 -- well, now it's 3:05. So, let's take a break for  
7 ten minutes. And in ten minutes, let's get back on and I will  
8 read my bench ruling. See you soon.

9 (Recess taken)

10 THE COURT: All right. Okay. I'm ready to read my  
11 ruling into the record. We're here on the emergency motion  
12 filed by Cozen O'Connor on behalf of certain purportedly  
13 authorized representatives, who I'll refer to either as the  
14 representatives or the movants. They're here as purported  
15 representatives of the primary debtor. But, of course, the  
16 issue before me is whether, in fact, they are properly acting  
17 on behalf of the primary debtor.

18 The representatives were purportedly appointed to  
19 their positions by a resolution of the executive committees of  
20 the mezzanine lenders of the secondary debtor. The emergency  
21 motion asks me to find on less than 48 hours' notice that the  
22 mezzanine lenders have full voting and managerial control over  
23 the primary debtor.

24 Based on this finding, the motion asks me to enter a  
25 number of -- enter an order -- sorry, let me try that again.



1 Based on that finding, the motion asks me to order, one, that  
2 the change in control of primary described in the notice filed  
3 on the docket on November 15 is effective. Two, that prior  
4 management is terminated from their positions with primary.  
5 Three, that primary's management and professionals are directed  
6 to cooperate with and provide information to the mezzanine  
7 lenders as entities in control of primary. And four, that the  
8 debtor can take all actions necessary to effectuate that  
9 release.

10 I'm going to decline to grant the requested relief  
11 for a number of reasons including principally that I don't find  
12 there's any showing of a need for emergency action. And two,  
13 that my preliminary view of the merits issue presented to me is  
14 that the lenders have not shown that they're likely to win on  
15 the merits. In fact, quite the contrary.

16 So what I'm going to do is I'm going to explain the  
17 reasons for my ruling. I'm then going to set this down for  
18 full briefing on a regular briefing schedule. And I'm going to  
19 set it for a hearing on January 12. I'm going to direct that  
20 the lenders file their brief one week from today. The lenders  
21 or authorized representatives, however we want to designate  
22 them. That the debtor file its responsive brief the following  
23 Friday. Obviously, I've set that schedule because the week  
24 after that is the week between Christmas and New Year's, and I  
25 assume that you all don't want to be briefing this during that



1 week. And I certainly don't want to hold a hearing that week.

2           Before I give a further explanation of my findings,  
3 let me make one other point. And that is when the lenders do  
4 come back with a further showing on the merits, I don't think  
5 the lenders have properly thought through the relief they're  
6 requesting. I think that if the lenders had persuaded me that  
7 they were right or likely to win on the merits, that would  
8 potentially have supported a finding that the lenders are  
9 entitled to exercise control over primary. That is, they're  
10 allowed to step into the shoes of the current equity owners and  
11 exercise all the rights that they would have as the holders of  
12 LLC interests.

13           It's -- several additional steps are required to get  
14 from that conclusion, which is the issue that's really been  
15 briefed, to get from there to the further types of relief that  
16 I've been asked to enter, particularly the request that I  
17 terminate management. That's something that needs to be done  
18 pursuant to proper corporate procedures, not by a court  
19 parachuting in and acting -- exercising powers under I don't  
20 know what authority. And similarly, directing management's -  
21 sorry, directing the primary debtors management and  
22 professionals to cooperate, there hasn't been a proper motion  
23 made to support relief of that sort either.

24           So if the debtor wants to seek relief of any of those  
25 sorts, I don't view that as being properly part of this motion.



1 You're welcome to do a follow on motion if you win on January  
2 12, you can file a follow on motion seeking relief of that  
3 sort. But you have not yet laid a necessary groundwork for me  
4 to consider granting that sort of relief, even if you win on  
5 the merits.

6 Okay, let me turn first to whether there's an  
7 emergency and I'll then turn to the merits. As I mentioned,  
8 during the hearing, there's been absolutely no proper  
9 evidentiary showing supporting the need for emergency relief.  
10 There's simply a declaration from counsel, actually, counsel  
11 who's brand new to this case, and presumably doesn't know a  
12 whole lot about what's actually going on at the debtor. And  
13 counsel's declaration contains just conclusory statements.

14 No detailed facts and no indication that this -- that  
15 these statements are based on personal knowledge, rather than  
16 being purely hearsay statements. So, counsel really should  
17 know better. You need to make a -- if you want relief from  
18 this Court, you need to make a proper evidentiary showing.

19 Now, I am a bankruptcy court. And so I did -- I do  
20 want to do what's best for the debtor, even if counsel have not  
21 properly put the evidence before me. And so I did hear the  
22 arguments of the lawyers for what they're worth about whether  
23 harm is likely to occur if I don't rule on the merits today.  
24 And what I'm about to say on that score, I hesitate to say it  
25 because it's not based on evidence. But if what counsel said



1 to me today were backed up by evidence, it still wouldn't  
2 support the need for emergency relief.

3           The one fact that I have before me that really is a  
4 fact, and not just lawyers say so, is that the parties have  
5 reached agreement on a new interim cash collateral order, which  
6 will run through January 11. There -- it also seems to be  
7 undisputed that there's a manager in place, and that the  
8 manager is able to continue to act on behalf of the hotel,  
9 despite the cloud caused by the uncertainty on the legal issue.  
10 And so you put all that together, it suggests to me that  
11 nothing terrible is going to happen if I defer ruling until  
12 mid-January, which is what I'm going to do.

13           And I -- the last thing I would say on that score is,  
14 you know, to the extent I'm giving any weight to statements of  
15 counsel, I found it encouraging that counsel for a number of  
16 relevant parties spoke up, including one of the Cadwalader  
17 lawyers, plus Mr. Ringel and Mr. Reich, and all of them seem to  
18 be in agreement that pushing this off till mid-January will not  
19 cause the sky to fall, although I suspect all of them agree  
20 that it is necessary to bring this issue to a head and decide  
21 it at some point before too long. And so that's what I plan to  
22 do. I do plan to rule shortly after the hearing that I'm  
23 scheduling.

24           Okay, let me turn to the merits. I have had a very  
25 limited amount of time and my clerks have had a very limited



1 amount of time to research the issues that have been raised  
2 before me, and the issues are not simple. And that's why I'm  
3 not going to rule on the merits today. Instead, what I'm going  
4 to do is I'm going to tell you my tentative thinking that in  
5 the hope that that may help shape your research and the  
6 arguments you make in your briefs. And when you're performing  
7 next in January, I have a strong preliminary view that the  
8 debtors win this fight on the merits. That is, that the  
9 lenders had no proper legal basis to exercise the management  
10 rights conferred by the LLC interests prior to taking title  
11 with respect to those rights.

12 I'm going to tell you why that's my strong leaning,  
13 but it's with the big caveat that my strong leaning is based on  
14 a limited amount of research and it's very possible that some  
15 of you will come up with stuff that I'm not aware of and that  
16 will change my mind.

17 But nevertheless, here's what I'm looking at right  
18 now. The lender has pointed to two provisions of the pledge  
19 agreement, both in Section 7 of that agreement. The two  
20 provisions are significantly different. The one that  
21 Mr. Strickon mentioned first during his argument today, if one  
22 was looking at nothing else, nothing other than this provision,  
23 this would seem to be a winner for him. This is the provision  
24 that says, quote, "lender may exercise all membership rights,  
25 powers, and privileges following a default to the same extent



1 as debtor is entitled to exercise such rights, powers, and  
2 privileges." On its face, that seems to be the relief that  
3 Mr. Strickon is asking for.

4           However, another passage in Section 7 of the same  
5 agreement is quite different. And I'm not going to read it  
6 verbatim. But to paraphrase, it essentially says that  
7 following default, the secured party can exercise management  
8 rights, quote, "to the maximum extent permitted by law." And  
9 that caveat is the crucial issue here, because as I'm about to  
10 address, applicable law, namely Delaware LLC law, appears to  
11 not allow a secured party to exercise management rights prior  
12 to foreclosure.

13           So there does -- there seems to be a tension between  
14 these two different passages that are both part of Section 7.  
15 Let me put a pin in that and turn to the Delaware law and the  
16 LLC agreement, and then I'm going to circle back to what does  
17 this say about how one interprets Section 7 of the pledge  
18 agreement.

19           The starting point in looking at Delaware law is the  
20 Delaware LLC statute, because primary, the debtor we're calling  
21 primary, is an LLC organized under Delaware law. So any issues  
22 concerning governance, LLC governance with respect to primary,  
23 including any issues concerning the construction of its LLC  
24 agreement or the implementation of that agreement, is governed  
25 by Delaware law.





1           The Delaware LLC statute has some very relevant  
2 provisions, and I'm going to quote a few of them. And --  
3 the -- no, it says that, quote, unless otherwise provided in  
4 the party's LLC agreement, one, an assignment of an LLC -- I'm  
5 paraphrasing to some extent -- an assignment of an LLC interest  
6 does not entitle the assignee to become or to exercise any  
7 rights or powers of a member. Two, an assignment of an LLC  
8 interest does entitle the assignee to share in profits, losses,  
9 distributions, et cetera, of the LLC. Three, the pledge of or  
10 granting of a security interest in an LLC interest of a member  
11 shall not cause the member to cease to be a member or to have  
12 the power to exercise any rights or powers of a member. That  
13 is, to reiterate, pledging the LLC interest does not strip the  
14 member of its powers as a member. And finally, assignees have,  
15 quote, "no right to participate in the management of the  
16 business and the affairs of an LLC, except as provided in the  
17 LLC agreement." And I've been quoting from section 18-70(a) of  
18 the Delaware LLC statute.

19           In short, the upshot of these provisions is that  
20 members of an LLC have both economic interests and non-economic  
21 interests, the former being rights such as the right to share  
22 in profits and losses, and those rights are freely  
23 transferable. Non-economic rights, such as the power to manage  
24 the entity, are not transferable unless -- prior to foreclosure  
25 unless otherwise provided in the LLC agreement.



1 And by the way, New York law is the same, although I  
2 don't think that matters here because there's no question that  
3 primary is a Delaware LLC.

4 So the next question is, what does primary's LLC  
5 agreement say? And for starters, let me say I am not happy  
6 about the fact that the lenders came running into court seeking  
7 emergency relief on very short notice, and they chose to put  
8 before me the pledge agreement, but not the LLC agreement. And  
9 they chose not to mention Delaware's LLC statute.

10 Mr. Strickon mentioned that he is not a secure  
11 transactions lawyer. Well, guess what? I'm not either, and  
12 most bankruptcy judges are not. I think it's quite troubling  
13 to seek relief and especially emergency relief where the Court  
14 is going to have limited time to review the arguments and fail  
15 to mention something as critical as this. Frankly, I think  
16 it's somewhat comparable to failing to cite a Second Circuit  
17 decision that is contrary. And as you know, the ethics rules  
18 provide that that is a serious breach of ethics.

19 At my request, counsel for the debtor provided my  
20 chambers with a copy of the LLC agreement just a few hours  
21 before the hearing and we reviewed it. And Section 23 of that  
22 agreement is extremely relevant. It has a number of relevant  
23 revisions. And for starters, Section 23(b) provides that upon  
24 a foreclosure sale or other transfer of the LLC interests in  
25 primary under the pledge agreement, the mezzanine lender or



1 other purchaser is automatically admitted as a member effective  
2 upon such foreclosure sale or other transfer.

3 It then says the following, quote, "upon a foreclosure  
4 sale or other transfer, the successor member is entitled to,"  
5 quote, "exercise all the rights and powers of the member  
6 pursuant to this agreement, including the power to designate,  
7 appoint, expel, and remove the directors and officers of the  
8 company." So these are exactly the rights that the lenders are  
9 telling me they have, but their LLC agreement provides that  
10 they -- explicitly that they do not have those powers until  
11 they have actually foreclosed, which they have not done.

12 Finally, section 23(c) provides that primary sole  
13 member, quote, "shall be permitted to pledge and upon any  
14 foreclosure of such pledge" -- sorry, "upon any foreclosure of  
15 such pledge in connection with the admission of the mezzanine  
16 lender or purchaser as a member, transfer to the mezzanine  
17 lender or other purchaser the member's rights and powers to  
18 manage and control the affairs of the company pursuant to the  
19 terms of the pledge agreement." So again, the power to manage  
20 the company kicks in for the lenders only upon foreclosure, not  
21 before.

22 So let's go back now to the to the pledge agreement.  
23 As I mentioned earlier, the first of the two clauses -- or  
24 there are two clauses. One of them says that management rights  
25 are transferred upon default, quote, "to the maximum extent



1 permitted by law", close quote. That provision clearly is very  
2 easy to harmonize with the LLC agreement and LLC statute  
3 provisions that I just discussed. You reach exactly the same  
4 conclusion.

5           The other relevant pledge provision is harder to  
6 harmonize. Arguably, it conflicts. In which case, I think,  
7 but I encourage all of you to brief this if you think that's  
8 helpful. I think that if that other portion that I quoted from  
9 Section 7 of the pledge agreement, if that other portion of the  
10 agreement is flat out conflicts with the LLC agreement, I think  
11 it's legally ineffective, inoperative, because I don't think  
12 the pledge agreement can give powers that the member doesn't  
13 have under the LLC agreement.

14           But again, I encourage you to brief that. I think  
15 another possible conclusion, another possible way to look at  
16 this passage from Section 7 is that the parties didn't really  
17 mean what it seems to say. And you have to read the expressed  
18 terms of this provision in conjunction with the other passage  
19 in Section 7, the one that does limit it to the extent  
20 permitted by law. And you have to say they really meant this  
21 should be construed to mean the same thing as that other  
22 passage.

23           In any event, that's an issue that I encourage the  
24 parties to brief, because to me, the answer to that question is  
25 not obvious based on the record before me. And I guess I



1 should also say, to the extent the parties wish to present  
2 evidence on how those provisions should be construed, or  
3 evidence on any other matter, bearing on the merits issue,  
4 you're welcome to do that. If you're going to do that, though,  
5 you know, just be aware in that event, the hearing in January  
6 will need to be an evidentiary hearing. It'll need to be in  
7 person in my courtroom. And there'll need to be advance notice  
8 and coordination concerning how testimony, witness testimony is  
9 going to be handled.

10 I guess what I should add is if you're going to do  
11 that, give me at least a week's advance notice and I'm going to  
12 want to schedule a pretrial conference at least a few days  
13 before the hearing to deal with any trial issues. Give me one  
14 moment.

15 That completes my preliminary ruling, my preliminary  
16 thinking on the merits issue. I welcome further briefing  
17 because, as I said, my thinking may not reflect everything that  
18 I should be considering and everything that you'll wish to  
19 bring before me when you have a bit more time to do so.

20 I do want to address one final issue before  
21 completing my bench ruling, and that is the automatic stay.  
22 Until today, until having analyzed the issues that are before  
23 me right now, I didn't think there was a stay issue. I didn't  
24 think the actions that lenders have been taking violated the  
25 stay or even, you know, raised a question as to whether they



1 might be violating the stay. Based on what I now know, based  
2 on having now seen the LLC agreement and read the Delaware LLC,  
3 the relevant provisions of the Delaware LLC statute, I have a  
4 serious question whether the debtors may have -- whether the  
5 actions the debtors have already taken may have violated the  
6 automatic stay.

7           And I encourage the debtors to either raise this  
8 issue with me or not, as they see fit. But I want to share  
9 with you my thinking on that and then I leave it to the  
10 debtors, whether they want to bring a motion to address this or  
11 I guess if the lenders want to bring a sort of preemptive  
12 motion asking for a ruling that there's no stay violation,  
13 they're welcome to do that as well.

14           The starting point for thinking about the stay here  
15 is the stipulation and order that I entered lifting the  
16 automatic stay pursuant to the settlement reached by the  
17 parties some months ago. That stipulation was drafted by the  
18 two parties and -- which may be relevant to how one construes  
19 what it means. But I'll quote the relevant language. It said  
20 that the stay, quote, "is terminated so as to permit the  
21 mezzanine lender to proceed with the UCC disposition of the  
22 debtor's membership interest in primary and to exercise any and  
23 all other rights and remedies relating thereto."

24           Now, up to now, I had not seen any reason to disagree  
25 with the lenders characterization of what that latter phrase,



1 rights and remedies relating thereto, meant. That is, I've not  
2 seen until now any reason to doubt that that included them  
3 taking steps purportedly standing in the shoes of the debtors  
4 management, such as purporting to replace the debtors manager  
5 and take other actions on behalf of the debtor. I think it's  
6 clear, though, based on my ruling so far that my prior reading  
7 of this provision may have been wrong.

8           That is, if my tentative ruling on the merits issue  
9 is correct and the lenders have no right until they foreclose  
10 to exercise any management powers on behalf of the debtor, then  
11 in that event, the phrase all other rights and remedies  
12 relating thereto would not seem to cover actions the lenders  
13 have taken to manage and control the debtor. That phrase  
14 instead would merely cover actions necessary to tee up the  
15 auction and sale of the membership interest, which is not the  
16 same thing as stepping into the debtor's shoes and purporting  
17 to manage the debtor.

18           So this is new to me. I had not thought of this  
19 problem. It should not have been new to the parties, because  
20 the parties drafted the LLC agreement. They were aware or  
21 arguably were on notice of what it said. I was not. It was  
22 not in the record before me until I asked for it and received  
23 it today.

24           So I think that's all I'll say on this front, but I  
25 think it's quite possible there has been a meaningful violation



1 of the automatic stay by the lenders. I don't know whether  
2 that has caused any harm. It's quite possible it has not. And  
3 so this may not be enormously consequential, but I did want to  
4 say that that seems to be the implication of my tentative  
5 ruling on the merits issue.

6 Give me -- I may be completed -- I may be done with  
7 my ruling. Give me one second.

8 Oh, okay. My clerks have corrected me about  
9 scheduling. I think I misspoke when I said -- I may have  
10 misspoken when I said January 12.

11 Let me put you on pause for a minute and I'll come  
12 back and clarify whether we're talking about a hearing on  
13 January 5 or on January 12. And then if the parties want to  
14 have availability issues, I'll obviously hear that as well.  
15 But first, give me one minute.

16 (Pause)

17 THE COURT: Okay, I'm back. Sorry if I -- I might  
18 have misspoken about the scheduling. What I meant to say or  
19 should have said is unless parties have a problem with this  
20 date, I want to schedule the hearing for January 5 at 2 p.m.  
21 And with the briefing schedule, the same as what I previously  
22 said, that is lender's brief due one week from today. Debtor's  
23 brief, that is Mr. Nash's brief, due one week thereafter. Does  
24 anybody have a problem with that schedule?

25 MR. NASH: Your Honor, Kevin Nash, I'm traveling that





1 week. Is it -- can we go back to the 12th?

2 THE COURT: Oh, okay. So, I -- let me hear what  
3 other parties have to say. I'm okay from my standpoint, from a  
4 chamber standpoint, I'm okay with January 12.

5 Mr. Strickon, do you have a position on that?

6 MR. STRICKON: January 12th is fine, Your Honor.

7 THE COURT: Okay.

8 MR. STRICKON: The only thing I would ask is if  
9 we're -- if the hearing is not until January 12th, could we get  
10 an extra few days for the filing of a brief?

11 THE COURT: Yeah, no, I think that's reasonable. So,  
12 actually, hang on one sec.

13 What if I propose January 11 instead of 12? Is that  
14 okay?

15 MR. STRICKON: Let me double check on there. January  
16 11th is fine also.

17 THE COURT: Okay.

18 Mr. Nash?

19 MR. NASH: Yes, that would be fine, Judge.

20 THE COURT: Okay. So, January 11 at 10 a.m.

21 MR. STRICKON: January 11th.

22 THE COURT: And that'll be a Zoom hearing unless  
23 people plan to put on testimony, in which case it'll be in the  
24 courtroom.

25 Okay, briefing. So, the problem we're facing is



1 Christmas week. But, give me one second.

2 So, Mr. Strickon, what if I gave you -- what if I  
3 gave you till Wednesday, December 20?

4 MR. STRICKON: That's fine.

5 THE COURT: Okay.

6 And Mr. Nash, what date do you want?

7 MR. NASH: Would it be okay with Your Honor if it was  
8 the Wednesday, you know, at least 10 days before? If we're  
9 going to do it on the 11th, maybe, if it's okay with Your  
10 Honor. I don't have a calendar, but January 3 or 4, I assume  
11 that's after New Year's.

12 THE COURT: Yeah, I'm going to give you until January  
13 5, just because you're --

14 MR. NASH: Thank you.

15 THE COURT: -- the one who got the short stick in  
16 terms of being forced to brief over the holidays.

17 MR. NASH: Right.

18 THE COURT: So, I'm giving you to Friday, January 5,  
19 which is six days before the hearing.

20 MR. NASH: I appreciate that, Judge

21 THE COURT: Okay, I need to wrap up because I'm now  
22 late for my next hearing. Is there any urgent final issue  
23 anybody needs to raise?

24 Okay, I will see you all on January 11. Happy  
25 Holidays to all of you.



1 UNIDENTIFIED: You too. Thanks, Judge.

2 UNIDENTIFIED: And good luck with your procedure,  
3 Judge.

4 UNIDENTIFIED: Thank you, you too, Judge.

5 UNIDENTIFIED: Good luck with the surgery.

6 UNIDENTIFIED: Yes.

7 THE COURT: Thank you very much.

8 MR. STRICKON: Take care.

9 THE COURT: Okay. Bye.

10 (Proceedings concluded)

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14 **C E R T I F I C A T I O N**

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16 I, Alicia Jarrett, court-approved transcriber, hereby  
17 certify that the foregoing is a correct transcript from the  
18 official electronic sound recording of the proceedings in the  
19 above-entitled matter.

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24 ALICIA JARRETT, AAERT NO. 428 DATE: December 12, 2023

25 ACCESS TRANSCRIPTS, LLC

